Supreme Court of the United States

OCTOBER TERM, 1961

No. 74

FEDERAL TRADE COMMISSION, PETITIONER

vs.

HENRY BROCH AND COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

INDEX

[fol. A]

Before

FEDERAL TRADE COMMISSION

Docket No. 6484

In the Matter
of
Henry Broch and Oscar Adler
copartners trading as
HENRY BROCH & COMPANY

APPEAL BRIEF FOR RESPONDENTS—May 31, 1957

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[fol. 1] PRELIMINARY STATEMENT

This case concerns a novel interpretation extending the Brokerage Clause of the Robinson-Patman Act beyond its Congressionally intended limitations so as to thwart price bargaining in food distribution at the expense of the consumer and the public interest.

The central issue is whether Section 2(c) of the statute, the so-called Brokerage Clause, guarantees permanently fixed rates of commission to brokers which may not be reduced by a seller even when compelled to lower his own price to a customer in order not to lose a valuable sale. The Initial Decision now under review penal-[fol. 2] izes an independent food broker for accepting a smaller commission at the seller's behest in such a situation. This unprecedented holding creates a new and potent legal instrument to block the normal process of price bargaining between buyer and seller, even where no discriminatory treatment among competing customers appears.

Such a construction departs radically from the legislative purpose of the Brokerage Clause in light of the prevalent evils at the time of its enactment: to declare *per se* illegal those underhanded transactions *by sellers* who *disguised* price discriminations to *favored buyers* as spurious "brokerage" payments for the buyers' benefit, so as to force all price differentials out into the open to be judged by the flexible price discrimination provisions in Section 2(a). That Congressional design is perverted in the case at bar. Here a *straight and open* price quotation by the seller stands condemned as an automatic Section 2(c) offense *on the part of the unwitting broker* who had to take a smaller commission or lose the deal.

STATEMENT OF THE CASE

A. *The Proceedings*

The Commission on January 11, 1956 issued a complaint charging respondents with violations of Section 2(c) of the amended Clayton Act. According to the [fol. 3] complaint, respondents "granted and allowed" a buyer approximately 60% of brokerage commissions

"paid" them by a seller principal for their services. More specifically, the complaint alleged that respondents in connection with a specified sale of food products successfully "requested" the seller to lower its established price to the buyer and "to recoup" for himself in part by deducting about 60% of their normal brokerage commission of 5%. (Cplt. par. 4.)

Respondents denied the essential allegations of the complaint and denied any liability under the Act.

Hearings were held before the Examiner on various dates between May 8, 1956, and October 3, 1956, at Chicago, Illinois, and Pittsburgh, Pennsylvania. The oral deposition of the manager of the seller firm was taken on August 6, 1956, at Kentville, Nova Scotia, before a Notary Public, with the Hearing Examiner present as an observer. This deposition was made a part of the record as an exhibit on behalf of respondents in lieu of being read into the record.

At the close of the evidence, proposed findings of fact, conclusions of law and order, together with supporting memoranda, were filed by counsel for both sides. The Hearing Examiner on February 26, 1957 filed his Initial Decision adjudging a violation of Section 2(c) and accordingly entering an order to cease and desist.

[fol. 4] B. *The Basic Facts*

So far as pertinent to this appeal, the basic facts as reported in the Initial Decision are:

Respondents Henry Broch and Oscar Adler are copartners trading as Henry Broch & Co., with their main office and place of business at 1525 E. 53rd Street, Chicago, Illinois. Respondents function as independent sales representatives or brokers by negotiating the sale of frozen foods, frozen fruits, fruit juices, and other food products for about twenty-five seller principals. These compensate respondents by commissions computed as a specified percentage of sales price—ranging from 2% to 5%, and averaging about 3%. Sales by respondents are negotiated "subject to confirmation" by the sellers, and no commission is due until after the buyer has paid.

The controversy at bar originates in a sale of apple concentrate negotiated by respondents in late 1954 for Canada Foods, Ltd., of Kentville, Nova Scotia, an apple processor, with the J. M. Smucker Company of Orrville, Ohio, a manufacturer of apple butter and preserves. In early October of 1954, Canada Foods notified respondents as well as Tenser & Phipps, another broker representing Canada Foods in Pittsburgh, Pennsylvania, that the price for the 1954 pack of apple concentrate was $1.30 per gallon in fifty-gallon steel drums. In subse-
[fol. 5] quent negotiations, carried on independently with Tenser & Phipps and respondents, the purchasing agent for Smucker insisted on a lower price. In fact, he expressly offered to take about 500 drums, an unusually large lot, at $1.25 per gallon from Canada Foods, suggesting that similar concentrate was available at this price from another source. Canada Foods was thereafter advised of Smucker's tender by both Tenser & Phipps and by respondents.

In the ensuing discussions with Tenser & Phipps, Canada Foods insisted that it could not afford to reduce its price below $1.30 unless coupled with some downward adjustment of the broker's commission.[1] Tenser & Phipps declined to adjust its commission, and instead addressed a letter informing the prospective purchaser that "We could confirm the order at the price of $1.25, but we are very much afraid that we would be right in the way of the Robinson-Patman Act and we might find our names in print." (I.D. p. 8.)

After taking respondents' transmittal of the Smucker offer of $1.25 under advisement for a day, Canada Foods notified respondent on October 27 that it "would be will-
[fol. 6] ing to make the sale at $1.25 per gallon, provided that Broch would agree to reduce his commission from 5 per cent to 3 per cent." (I.D. p. 10.) According to the Examiner, respondent "agreed to [this] proposal and then telephoned [Smucker's purchasing agent] to

[1] There is considerable doubt as to the accuracy of this finding by the Examiner, based on testimony by Phipps which is flatly contradicted by Koldinsky, Canada Foods' manager. (*Compare* Depos. pp. 10, 19; with Tr. 100-101.) See note 2 *infra*.

advise him that his principal had agreed to sell at $1.25 per gallon, due to the large size of the order." (I.D. p. 10.)

When thereafter instructed by Canada Foods to suspend all sales of apple concentrate temporarily, Tenser & Phipps expressed its chagrin at the lost deal with Smucker, again made a record by citing the Robinson-Patman Act, and asserted its reluctance "to work with unclean hands." (I.D. p. 10.)

C. *The Decision under Review*

On the basis of these cardinal facts, the Examiner ruled that the price reduction to Smucker by Canada Foods, located in Canada beyond the Commission's jurisdiction, placed *respondents* in violation of Section 2(c). The Examiner acknowledged, but dismissed as immaterial, that *no proof* supported the complaint's allegations that respondents as brokers originated the transaction by "requesting" Canada Foods to lower its price and "to recoup" the reduction out of their brokerage commission. (Cf. Cplt. par. 4 with I.D. p. 22.) Nevertheless he viewed Canada Foods' price quotation to Smucker as [fol. 7] comprising an unlawful "allowance or discount in lieu of commission or brokerage," and fastened Brokerage Clause liability on the respondents. (I.D. pp. 23-24).

Questions Presented

Section 2(c), the so-called Brokerage Clause of the Robinson-Patman Act, in pertinent part provides:

> "That it shall be unlawful for any person * * * to pay or grant * * * anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof * * * either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is granted or paid." 15 U.S.C. § 13(c) (1952).

This appeal chiefly concerns the serious legal issues presented even under the Examiner's version of the facts hostile to respondents:[2]

The basic legal questions before the Commission are:

(1) Whether Section 2(c)'s ban on commissions by a seller "to the *other party*" or the intermediary of the *other "party"* also imposes a liability on an independent seller's broker.

[fol. 8] (2) Whether an independent broker's acquiescence in a smaller commission at the seller's behest can be deemed a *"payment to" the "other party"* in the transaction *by the broker.*

(3) Whether an outright price reduction not directly related to a given brokerage commission in conception or size nevertheless constitutes an allowance "in lieu of brokerage."

(4) Whether the paramount public interest is fostered by a formal proceeding based on an isolated transaction of *de minimis* scope generating a purely private grievance between a respondent and a disgruntled rival; and whether it is in the public interest to construe the Brokerage Clause to inhibit price bargaining by creating a privileged sanctuary for brokerage commissions sheltered by law from the normal competitive stresses of the market.

Argument

A. *Section 2(c) Enacts No Liability for Independent Sellers' Brokers*

The text as well as the legislative purpose of the Brokerage Clause confirm that Congress sought to interdict only discriminatory practices *on the part of sellers and buyers,* without jeopardizing the hapless broker whom the law aimed to protect.

[fol. 9] The basic objective of Section 2(c) was to abolish the practice, prevalent in the years prior to 1936, of sellers granting price discriminations to favored cus-

[2] Respondent of course does not waive its rights to contest the Examiner's findings on controverted facts.

tomers disguised as payments to "dummy brokers" or other "bogus" entities established for the buyer's benefit.[3] Besides prejudicing those customers not accorded comparable privileges, such arrangements with large buyers were also feared to starve independent brokers out of existence. The Brokerage Clause of the Robinson-Patman Act implements the Congressional concern with that technique for masking price differentials as broker's fees.

Understandably enough in light of this objective, the text of Section 2(c) does not inflict legal liabilities on those independent brokers whom Congress wished to preserve. To be sure, Section 2(c) nominally refers to [fol. 10] payments by "any person," rather than by sellers and buyers only. But to consider an independent seller's broker as a "person" under this provision makes nonsense of it. For it would then prohibit "any [broker]" from paying or granting a "commission, brokerage, or other compensation" etc. "either to the *other party*" or to the intermediary of that *other "party"* to the transaction. A *broker* paying "commissions" or "brokerage" is queer enough. But, above all, since an independent broker by definition cannot fuunction as a "party," he could not conceivably be reached by a ban on concessions to *other* parties.

Rather, the prohibition in Section 2(c) is best understood in its most natural meaning: as condemning cer-

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[3] As explained by Senator Logan, "In order to evade the provisions of the Clayton Act, however, it was found that while direct price discrimination could not be indulged in, the buyer, if he were sufficiently powerful, could designate someone and say, 'That is my broker.' Perhaps it was a clerk in his office. Perhaps it was a manager of a store. Perhaps it was a subsidiary corporation organized for the purpose. However, the buyer would say to the seller, 'You must sell through that man, and you must pay him a certain percentage or amount of brokerage'; and when the so-called broker or dummy broker received what was paid him, he turned it over to the buyer, and in that way a price discrimination was brought about." 80 Cong.Rec. 6281-82 (April 28, 1936). See also 80 Cong.Rec. 3114, 7759-60 (1936); and Hearings before the House of Representatives Judiciary Committee on Bills to Amend the Clayton Act, 74th Cong., 1st Sess., pp. 37, 218, 258 (1935).

tain discriminatory transactions between sellers and buyers who are "party" to a transaction. Thus, a "person" within the meaning of Section 2(c) is either the purchaser or the seller[4]—but not a broker.

[fol. 11] The legislative history equally refutes any liability for independent seller's brokers in Section 2(c). Not a line in the voluminous hearings and debates preceding enactment even hints that *anyone other than a seller* can incur liability for paying illicit "brokerage" to the buyer side. Rather, as explained by the draftsman of the Patman bill, the Brokerage Clause "prohibits the payment of brokerage to an intermediary by any *party* to the transaction other than the one for whom the service is rendered."[5] Corroborating this understanding, the Report of the House Judiciary Committee on the bill delineated the statutory ban on brokerage commissions thus:

> "It prohibits its allowance *by the buyer* direct to the seller, or *by the seller* direct to the buyer; and it prohibits its payment *by either* to an agent or

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[4] No significance attaches to use of "person" rather than some more descriptive noun in Section 2(c). The same term "person" introduces Section 2(a), 2(e), and 2(f) as well, and in each instance refers only to the buying and selling parties in a commercial transaction.

Contrariwise, when Congress wished to extend liability beyond the immediate buyer-seller parties, it utilized more embracing terminology. For example, Section 3, the criminal provision of the Robinson-Patman Act, reaches any "person" who is "a party to" or may "assist in" an illegal transaction. 15 U. S. C. § 13a (1952).

[5] Hearings, *supra* note 3, at 217. (Emphasis added throughout unless otherwise indicated.) Mr. Teegarden also depicted the vice at which the provision was aimed: "Where A. & P. or another firm comes up to a manufacturer's door and says, 'Here I am, a large buyer', that manufacturer does not need to engage a broker to find him a market. The brokerage function is not present there. And when A. & P. says, 'I will buy from you if you sell me through my brokerage concern and pay the brokerage which I will drain off in dividends', the brokerage function is being prostituted for the reaping of an unfair price concession. That is what it amounts to. That is the evil which this brokerage clause will prohibit." *Id.* at 218.

> intermediary acting in fact for or in behalf, or subject to the direct or indirect control, of the other."[6]

[fol. 12] That consensus prevailed likewise in the floor debates prior to enactment. Senator Logan, who piloted the bill through the Senate, explained that the provision "forbids the payment or allowance of brokerage either to the *other principal party,* or [its] intermediary";[7] and provides that "no buyer shall engage in this trick brokerage practice whereby a rebate may be made *by the seller.*"[8] And Representative Patman assured the House that the bill would "prohibit one party from bribing the representative of the other under the guise of brokerage allowances or commissions."[9] Above all, Representative Utterback, the Chairman of the Senate-House Conferees, analyzed the finalized bill immediately preceding enactment in the following comprehensive detail:

> "If an intermediary is employed, and is in fact acting for or under the control of the buyer, then *the seller cannot pay* him. Or if he is acting for or under the control of the seller, then *the buyer cannot* pay him. And where sales are made from buyer to seller, in the nature of the case no brokerage services are rendered by either, and no payment or allowance on account thereof can be made by *either party* to the other."[10]

[fol. 13] If Congress in Section 2(c) undertook to expose independent brokers to legal liability, as the Commission's staff in the instant case maintains, its failure to utter any indication of that purpose in the voluminous hearings and debates is astonishing indeed.[11]

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[6] H.R. Rep. 2287, 74th Cong., 2d Sess., p. 15 (1936).

[7] 80 Cong.Rec. 3114 (March 3, 1936).

[8] 80 Cong.Rec. 6281-82 (April 28, 1936).

[9] 80 Cong.Rec. 7759-60 (May 21, 1936).

[10] 80 Cong.Rec. 9418 (June 15, 1936).

[11] The interpretation espoused by the Initial Decision musters some ambiguous smatterings which fail to support the crucial point. Equivocal statements by a grocery manufacturers' associa-

Moreover, the courts uniformly confine Section 2(c) liability to payments by *sellers* to buyers. The Court of Appeals in the *Quality Bakers* case construed Section 2(c) "to prohibit the payment of brokerage in any guise *by one party* to the other, or the other's agent." [12] And the *Southgate Brokerage* case declared that Section 2(c) "specifically forbids the payment of brokerage *by the* [fol. 14] *seller* to the buyer or the buyer's agent." [13] No court to date has ruled otherwise.[14]

In view of this universal consensus limiting 2(c) liability to illicit "brokerage" payments by *sellers* to buyers, adoption by the Commission of the Initial Decision in the instant case would mark a novel and radical departure.[15] Once anyone other than a seller or buyer is

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tion in hearings on an entirely different bill (S. 4171, which had no brokerage section) are of dubious relevance. (I.D. p. 17.) And statements that transactions involving "split brokerage" are illegal do not establish that an independent seller's *broker* is liable. Rather, the very sources cited by the Initial Decision (*id.* at 17-19) impose liability for "split brokerage" deals *on the seller*, not the broker. The rationale is that brokerage payments by a seller *to a broker* actually destined for the buyer are illegal because made to a person who in this respect is acting "for" the buyer. The sole contrary indication appears in Representative Patman's book published two years after passage of the Act. But Mr. Patman's private 1938 commentaries surely cannot create retrospective legislative history to contradict the Congressional understanding in 1935-1936 at the time of enactment. Compare Mr. Patman's 1956 views, p. 22 *infra*.

[12] *Quality Bakers of America* v. *Federal Trade Commission*, 114 F. 2d 393, 398 (1st Cir. 1940).

[13] *Southgate Brokerage Co.* v. *Federal Trade Commission*, 150 F. 2d 607, 609 (4th Cir. 1945).

[14] *Oliver Bros., Inc.* v. *Federal Trade Commission*, 102 F. 2d 763, 770 (4th Cir. 1939), cited by the Initial Decision, declares the *seller* liable in "split brokerage" dealings.

[15] The Initial Decision cites two proceedings holding independent sellers' brokers liable for their payment—to direct purchasers—of brokerage commissions ordinarily due to their sub-brokers in comparable transactions. *W. E. Robinson & Co.*, 32 F. T. C. 370 (1941); *Custom House Packing Corp.*, 43 F. T. C. 164 (1946). Neither case constitutes a precedent as an adjudication, for the respondents waived their defenses and consented to orders. On

deemed a "person" subject to the Robinson-Patman Act, a sweeping vista of hitherto unsuspected consequences might unfold. Any other intermediary—whether a broker, salesman, factor, advertising agency or medium—might face legal risks as a "person" chargeable with "inducing" price discriminations within the meaning of Section 2(f); or "contributing" to the furnishing of discriminatory services under Section 2(e).

[fol. 15]

B. *The Brokerage Clause Reaches Only Illicit Grants DIRECTLY to Buyers*

Even if independent sellers' brokers were technically liable under Section 2(c), its specific bans on allowances directly *from grantor to grantee* cannot apply to the transaction alleged at bar. To acquiesce in a lower rate of commission by the seller is neither to "pay" not to "grant" a brokerage allowance on respondent *broker's* part, and in no event runs *to* the buyer in the transaction.

The explicit specificity of the Robinson-Patman Act precludes the unprecedented twist [16] whereby the Initial Decision arrived at a Brokerage Clause violation. Section 2(c) simply prohibits a respondent "to pay or grant" a forbidden consideration "*to* the other party" or his agent. To approximate that element of the statutory offense, the complaint alleged that respondent "requested" the seller to quote the purchaser a lower price, to be financed out of a smaller "brokerage" commission. (Cplt. par. 4.) Owing to the total failure of proof on this score, the Initial Decision equated the broker's acceptance of a

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the opposite side of the argument is the Commission's dismissal in *D. J. Easterlin*, 33 F. T. C. 1639 (1941), also charging unlawful payments by a broker.

At any rate, these administrative expressions are now superseded by the more recent appellate judicial declarations, *supra*.

[16] The consent orders entered in *W. E. Robinson & Co., supra* and *Custom House Packing Corp., supra*, concern orthodox face-to-face deals between grantor and grantee of the challenged payments.

lower commission with an "indirect payment" *by him to the buyer*. But unlike the overall prohibition in Section 2(a) on competitively inimical price discriminations—[fol. 16] "direct" as well as "indirect"—, the Brokerage Clause was drafted for the one auxiliary purpose of driving out into the open one particular subterfuge for disguised discriminations granted *by sellers to buyers or their fronts*.

The Examiner's "indirect payment" theory for pursuing *triangular transactions*—from broker, to seller, to seller, to buyer—not only ignores that legislative design,[17] but also renders redundant most of the text of Section 2(c). For if Section 2(c) barred "indirect payments" generally, no need would have existed for its intricate bans on payments "to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation [fol. 17] is granted or paid." Such deals would have been covered anyhow as "indirect payments" by the seller to the buyer—*IF "indirect" payments generally had been within the legislative intent*.

Without a doubt, incorporation by Congress of this "indirect payment" concept *might have* trimmed and

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[17] The Initial Decision excerpts a fractured sentence from a legislative report to the effect that Section 2(c) "prohibits the *direct or indirect* payment of brokerage" (I. D. p. 21)—omitting what Congress deemed an "indirect" payment. According to identical explanations in the Senate and House Judiciary Committee Reports, the Brokerage Clause strikes at "the practice of certain large buyers to demand the allowance of brokerage *direct* to them upon their purchases, *or* its payment to an employee, agent, or corporate subsidiary whom they set up in the guise of a broker, and through whom they demand that sales to them be made." Payment by one party either *directly to another party* or *indirectly through his intermediary*, rather than the bizarre interpretation of the Initial Decision, is the relevant reference of the quoted excerpt. S. Rep. No. 1502, 74th Cong., 2d Sess., p. 7 (1936); H.R. Rep. No. 2287, 74th Cong., 2d Sess., p. 15 (1936). See also *Biddle Purchasing Co.* v. *Federal Trade Commission*, 96 F. 2d 687, 693 (2d Cir. 1938).

beautified the dreary prose of Section 2(c).[18] But Congress preferred to enact a specific albeit verbose prohibition. And the Commission's delegated powers do not include plastic surgery.

Furthermore, a broker's acquiescence in a lower commission at the seller's request in no event can be deemed a payment or grant of an allowance *to the buyer*. Such a "constructive" payment *might* be conceivable if the broker on his own initiative directed the seller to turn over funds to the buyer, in the cloak of a spurious price re- [fol. 18] duction or otherwise. But that is not the situation in the case at bar. Contrary to the allegations of the complaint, the Initial Decision reported that the *seller called respondent* to advise of his willingness to quote a lower price "provided that Broch would agree to reduce his commission from 5 per cent to 3 per cent." (I.D. par. 15.)

Moreover, to construct a fictitious payment *to the buyer* from the broker's acceptance of a smaller commission invites preposterous results. If another broker entirely strange to the negotiations had from the outset agreed to operate on a 2% commission basis in rivalry with respondent or other brokers accustomed to 3%, *his* conduct might with equal illogic be condemned as entailing an "indirect grant" to the buyer—of the 1% which he failed to secure in the transaction.

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[18] Congress *could have* achieved this result in a host of ways illustrated by the terminology of other Robinson-Patman provisions. Most simply, Congress *might have* outlawed any illicit brokerage paid "either directly or indirectly," in harmony with the text of Section 2(a). Also, the law *might have* banned payments "for the benefit of" another party, in the vernacular of Section 2(d); or prohibited anyone from "contributing" to illegal brokerage, in the phrase of Section 2(e). Finally, per the text of the criminal Section 3, Congress *might have* forbidden anyone to "assist in" a "sale" or even "contract to sell" of the proscribed character.

The point is that Congress in Section 2(c) *chose not to* employ any of these drafting techniques for reaching the conduct challenged at bar. It is for this reason that the Initial Decision could not operate within the textual framework of Section 2(c), but had to resort to unauthorized improvisation.

Such a doctrine could only serve to freeze into law a uniform pattern of "brokerage" fees set always at the level of the highest commission, without regard for the welfare of the public which must ultimately defray the resultant swollen costs of distribution.

C. *Allowances "In Lieu of Brokerage" Must Causally Relate To Eliminated Brokerage Commissions*

At all events, a price reduction cannot constitute an allowance in "lieu of brokerage" within the meaning of Section 2(c) unless directly correlated with a brokerage [fol. 19] commission in both conception and amount. This is the rationale of the Commission's recent *Main Fish Company*[19] decision, which the Initial Decision at bar ignores and flouts.

Main Fish dismissed a Brokerage Clause complaint predicated on the rationale of the instant Initial Decision. In the case at bar, the Examiner purported to detect an illegal allowance "in lieu of brokerage" because respondents allegedly "contributed" to the price reduction quoted by the seller to the buyer. (I.D. p. 23.) But *Main Fish* held that the simultaneous presence of a reduced price and an eliminated "brokerage" fee could not generate a presumption that the lower price reflected an "allowance in lieu of brokerage." The Commission stressed in this connection that the "pricing variations were not shown to be arithmetically commensurate with the pattern of brokerage" in other transactions, and dismissed the complaint for want of that causal parallel.[20]

That holding is *a fortiori* dispositive here. Two vital factors destroy the requisite nexus between Canada Foods' price quotation to Smucker and the respondents' brokerage commission:

[fol. 20] In the first place, vital considerations other than respondents' acquiescence in a reduced commission animated the seller's unilateral decision to lower his price. For example, the Smucker Company's order concerned an unusually large shipment of apple concentrate, per-

[19] Dkt. 6386 (July 30, 1956).

[20] *Id.* at p. 3.

mitting various economies in handling, freight, and customs fees at the border.[21] Besides, Canada Foods was well aware of lower price offerings by competitors to this prospective customer which it would have to meet or lose the sale.[22] These elements influenced the seller's price quotation in material respects.

In addition to these independent contributory circumstances, Canada Foods' price reduction had scant relation to respondents' commission. The seller lowered its price from $1.30 to $1.25 per gallon of apple concentrate, while respondents acceded to a downward adjustment of their commission from 5 to 3%. Respondents' theoretical "loss" of 2% on a product priced at $1.30 a gallon amounted to 2.6¢—whereas the buyer secured a full 5¢ price reduction from Canada Foods.

Obviously a price cut almost double the amount of a "waived" brokerage commission and animated by a host [fol. 21] of independent commercial considerations can be deemed an "allowance in lieu of brokerage" only at a disregard of business realities as well as the controlling rationale of the *Main Fish* decision.[23]

Indeed, *Main Fish* and the instant Initial Decision cannot logically coexist. If a net price reduction constitutes an "allowance in lieu of brokerage" merely because the elimination of certain brokerage fees is one "contributing" factor, the *Main Fish* proceeding could not have been dismissed. For, though the price differential there at issue was not "arithmetically commensurate" with the eliminated brokerage commissions, they were doubtless a "contributing" factor in the lower prices quoted to buyers who saved the seller a brokerage fee.

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[21] See *e.g.*, Dep. pp. 4, 5, 6, 18, 21.

[22] *Id.* at p. 20.

[23] This is the manifest reasoning of the Commission's proceeding in *Fruitvale Canning Co.*, Dkt. No. 5989 (June 15, 1956), which adjudged price differentials in the context of eliminated brokerage commissions as illegal discriminations under Section 2(a) where the size of the price reductions exceeded the amount of the saved brokerage fees.

It is the *Main Fish* rationale of *conservative* application of Section 2(c) in *net price quotation cases* which should reign dominant in Robinson-Patman enforcement. Whatever the broader philosophic controversies over the Act as an instrument of economic progress in a dynamic [fol. 22] age, even its most dedicated disciples acknowledge the primacy of the flexible price discrimination bans of Section 2(a). According to a recent friendly Congressional Report under the auspices of Rep. Patman, "False brokerage qua brokerage is absolutely forbidden. False brokerage qua 'a naked quotation in price' does not fall into the 'masquerade' category; rather it falls into the trap deliberately set for it by the law. Discriminatory concessions which cannot disguise themselves as brokerage or 'allowances' are thus forced to to show their true character, and *to be measured by the sections of the law dealing with discrimination.*"[24]

By that standard as well as the *Main Fish* doctrine the transaction at bar should have been challenged, if at all, under Section 2(a) against the appropriate parties.[25] The immunity of Canada Foods from the Commission's process in Nova Scotia cannot excuse a strained statutory interpretation for dragging in a Chicago broker by the heels as a second-choice respondent.

[fol. 23] D. *This Case Thwarts Rather Than Fosters the "Public Interest"*

Whatever else, this case should be dismissed as contrary to the "public interest" that all Commission proceedings must subserve.[26]

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[24] Report of the House Small Business Committee on *Price Discrimination, The Robinson-Patman Act, and the Attorney General's National Committee to Study the Antitrust Laws*, H.R. 2966, 84th Cong., 2d Sess., pp. 97-98 (1956). Cf. also, "If the objective of 2(c) was to bring price discriminations into the open, then when they are brought into the open the validity of the differentials should be tested under 2(a)." Cyrus Austin, Discrimination in Practices, in *How to Comply with the Antitrust Laws*, pp. 174, 180 (CCH 1954).

[25] Cf. the *Fruitvale Canning* decision, note 23 *supra*.

[26] The "public interest" is an essential element in Clayton Act as well as Federal Trade Commission Act cases instituted by the

At the outset, this case concerns a wholly isolated transaction of *de minimis* dimensions. The record at bar is occupied exclusively with respondents' participation in a single challenged sale of apple concentrate by Canada Foods to Smucker in late 1954. The only alleged vice concerns respondents' acquiescence in a brokerage commission cut by the seller from 5 to 3%, in conjunction with his own price reduction from $1.30 to $1.25 per gallon. Accordingly, the nub of illegality is respondents' alleged "waiver" of commissions in the amount of 2.6¢ per gallon, totaling less than $1000 in all. The Commission has applied the *de minimis* principle to dismiss proceedings of far greater magnitude than this. *E.g., B. F. Goodrich Co.*, Dkt. 5677 (Jan. 22, 1954). For it neither promotes the "public interest" nor enhances the stature [fol. 24] of the Commission to hound trivia—particularly by resort to novel and dubious statutory improvisations.

No "public interest," moreover, can ever inhere in a private grievance between business rivals. This proceeding against respondents manifestly originated with the personal pique of another broker who muffed the deal which respondents closed. The Initial Decision with refreshing candor recounts the saga of Tenser & Phipps, the Pennsylvania broker who lost a sale and set out to win a lawsuit. The moment that Tenser & Phipps felt its fee slip away when its negotiations between Canada Foods and Smucker turned sour, it insinuated the Robinson-Patman Act into the picture. (I.D. pp. 8, 10.) With vindictive finesse and foresight, Tenser & Phipps kept an eye to the future, built a record by drafting pregnant correspondence—and emerged next as star witness for the prosecution on the appointed day.

Commission. *E.g., Argus Cameras, Inc.*, Dkt. 6199 (Oct. 20, 1954); *Bohn Aluminum & Brass Corp.*, Dkt. 5720 (May 20, 1955); *Sylvania Electric Products, Inc.*, Dkt. 5728, p. 1 (Sept. 23, 1954); *B. F. Goodrich Co.*, Dkt. 5677 (Jan. 22, 1954). For recent judicial dovetailing of the two statutes, see *Federal Trade Commission* v. *Reed*, 1957 CCH Trade Cases, par. 68,676 (7th Cir. 1957); *Menzies* v. *Federal Trade Commission*, 1957 CCH Trade Cases, par. 68,648 (4th Cir. 1957); *Federal Trade Commission* v. *Tuttle*, 1957 CCH Trade Cases, par. 68,669 (2d Cir. 1957).

But however deep Tenser & Phipps' chagrin at its bungled deal with Smucker, the "public interest" entrusted to the Commission does not embrace such picayune mercantile grievances or private vendettas. Rather, the Commission in deference to its paramount "public interest" responsibilities "must be ever vigilant against the possibility of its processes being used to further the private interest of any party." *Wilson Tobacco Board of Trade, Inc.*, Dkt. 6262 (April 25, 1956). When the "pri-
[fol. 25] vate character" of a controversy appears, a Commission proceeding is "not one in the interest of the public" and must be dismissed. *Federal Trade Commission* v. *Klesner*, 280 U.S. 19, 30 (1929).

Above all, the theory of the instant proceeding may thwart the "public interest" by stifling normal price bargaining in food distribution. The law of this case, in a nutshell, is that brokers' commissions are immune from adjustment in the course of negotiations for the sale of food products, since any reduction of such a commission in connection with a lower price is illegal *per se* under Section 2(c).[27] That doctrine, moreover, applies even *when the seller treats every customer alike.* A lower price across the board to all customers would in fact compound the violation, for each reduction to any customer would constitute a separate offense.

So construed, Section 2(c) operates to create a privileged sanctuary for brokerage commissions at the expense of the public. As illustrated by the "subtle" correspondence of Tenser & Phipps at bar (I.D. pp. 8, 10), the Brokerage Clause would serve as a bludgeon to coerce buyers and sellers any time their normal price bargaining imperiled a broker's fee. Actually, that risk would attend *any* reduction from a previous price quotation whenever
[fol. 26] a broker was on the scene. For *any* lower price will *always* entail a smaller *dollar amount* of commission, unless the broker's *percentage* rate is immediate-

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[27] While the Commission will not pass on the constitutionality of its governing statutes, a court might well hold that such an arbitrary application of Section 2(c) raised grave problems under the Fifth Amendment. Cf., *e.g.*, *Bolling* v. *Sharpe*, 347 U.S. 497 (1954).

ly raised. The inevitable tendency of such a doctrine is to chill price bargaining and freeze brokerage commissions at artificially high levels. And when an important element in the cost of food distribution is immunized from the pressures of competition, the consumer's food bill in the end will pay the freight.

Such a perversion of the Congressional objective clashes with antitrust policy and flouts the "public interest." Comparable efforts to "stabilize" and rig brokerage commissions in other areas of the economy have been vigorously pursued as illegal restraints of trade under the Sherman Act. *E.g., United States* v. *National Association of Real Estate Boards*, 339 U.S. 485 (1950); *United States* v. *American Association of Advertising Agencies, et al*, 1956 CCH Trade Cases, par. 68,252 (S.D.N.Y. 1956); cf. *Sugar Institute* v. *United States*, 297 U.S. 553, 587-88 (1936). Trade restraints in the distribution of groceries surely do not occupy a preferred antitrust position. Cf. *National Food Brokers Association, et al*, Dkt. 6363 (Oct. 7, 1955).

Nor can it be said that Congress in Section 2(c) ordained what the Sherman Act forbids. Section 11 of the Clayton Act expressly declares that no Commission order "shall in any wise relieve or absolve any person from any liability under the antitrust Acts." And the statutory interpretation at bar, if not wholly untenable, is admittedly novel and entails the administrative interpolation of a purported legislative "omission." (I.D. p. 21; cf. p. 24.)

[fol. 27] But the Supreme Court has recently denounced strained interpretations of the Robinson-Patman Act which "give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation." *Automatic Canteen Co.* v. *Federal Trade Commission*, 346 U.S. 61, 63 (1953). The Court refused to construe the Act's "ambiguous language as putting the buyer at his peril whenever he engages in price bargaining." *Id.* at 73. Announcing a doctrine dispositive here, the Court held that "such a reading must be rejected in view of the effect it might have on that sturdy bargaining between buyer and seller for which scope was pre-

sumably left in the areas of our economy not otherwise regulated." *Id.* at 73-74.

Conclusion

For the above reasons, respondents respectfully request that this proceeding be dismissed.

Respondents in conformity with Rule 3.23 of the Commission request opportunity for oral argument in the premises.

Respectfully submitted,

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May 31, 1957

[fol. 28] [File endorsement omitted]

[fol. 29] IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 12305

HENRY BROCH & CO., PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

Petition For Review Of Order Of Federal Trade Commission Upon Remand From The United States Supreme Court

MOTION TO SET ASIDE OR MODIFY COMMISSION ORDER FOR REASONS NOT CONSIDERED IN ORIGINAL OPINION—
Filed October 14, 1960

On June 6, 1960, the Supreme Court by a narrow 5-4 margin reversed this Court's decision of December 11, 1958, which held that a seller's broker is not covered by Section 2(c) of the Robinson-Patman Act, and remanded the case to this Court for further proceedings consistent with its opinion. 363 U.S. 166, *reversing*, 261 F.2d 725. On October 10, 1960, the Supreme Court denied a timely petition for rehearing.

Petitioner now moves the Court to set aside or modify the Federal Trade Commission's order for the reasons detailed below,* which were not considered by the Court's original holding on the threshold issue of whether Section 2(c) covered an independent seller's broker, and which are left open by the Supreme Court's remand.

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* These issues are comprehended within the original petition for review (J.A. 206).

[fol. 30] ORIGINAL PROCEEDINGS

On January 11, 1956, the Federal Trade Commission issued a complaint which charged that petitioner violated Section 2(c) of the Robinson-Patman Act by granting a part of his brokerage commission to a buyer in the form of a lower price for the seller's product in one specified transaction on behalf of a named seller to a named customer (J.A. 1-5). After administrative proceedings, the Commission found that petitioner, functioning as broker for Canada Foods, Ltd., a Canadian processor of apple concentrate, had negotiated a sale of 500 barrels of concentrate at $1.25 per gallon in fifty-gallon steel drums to the J. M. Smucker Company. The price for this exceedingly large order was 5 cents per gallon less than the seller's customary price of $1.30 on smaller purchases, which this buyer had refused to pay. Petitioner accepted a 3% commission on the controverted sale instead of his originally contemplated 5% commission because this "very large order" permitted substantial economies so that in the end he "would make more" (J.A. 77).

From the outset, petitioner maintained, and this Court later ruled, that a seller's broker was not covered by the prohibition of Section 2(c) (Br. pp. 12-20).

Furthermore, even assuming that the statute applied to him in the first place, petitioner contended that the price reduction to the buyer was accounted for by legitimate competitive and economic considerations other than his reduced rate of commission, and hence was not an allowance "in lieu of" brokerage within the contemplation of Section 2(c) (Br. pp. 20-27). To that end, petitioner pointed to record evidence that the seller's price reduction was responsive to competitive factors as well as cost economies flowing from this particular buyer's unusual quantity and method of purchase (J.A. 31, 75-76, 127-130, 132-135).

[fol. 31] However, having resolved the issue of statutory coverage adversely to petitioner, the Commission held "not applicable to a proceeding under subsection 2(c)" these factors tendered by petitioners to justify the controverted sales transaction (J.A. 204), and according-

ly issued an order to cease and desist, which flatly prohibited a "reduction in price" when "accompanied by a reduction in the regular rate of commission"—regardless of any cost or competitive considerations (J.A. 198).

After consideration of briefs and oral argument, on December 11, 1958 this Court set aside the Commission's order, holding that "Neither the language of § 2(c) nor its legislative history indicates that a seller's broker is covered by § 2(c). Accordingly we hold that petitioner, as seller's broker, did not violate § 2(c)." 261 F.2d 725, 728.

Since the Court reversed the Commission on the threshold issue of whether Section 2(c) covered a seller's broker, it had no occasion to review the Commission's rejection of petitioner's evidence and proposed findings that the reduced price to Smucker did not constitute an allowance "in lieu of" brokerage, but represented other cognizable economies and competitive circumstances relating to this particular buyer (J.A. 161, 163). Also, in view of its invalidation of the FTC's order on the merits, the Court did not reach or adjudicate the scope of the Commission's order to cease and desist.

Due to the Supreme Court's subsequent reversal of this Court's statutory interpretation that a seller's broker is not covered by Section 2(c), it is now appropriate to consider those issues, not adjudicated in this Court's original opinion, which independently invalidate the Commission's order.

[fol. 32] FACTORS IMPROPERLY REJECTED BY THE COMMISSION

As explained above, the Commission viewed "not applicable" in a Section 2(c) proceeding evidence that the seller's price to the buyer was responsive to economies and competitive considerations unrelated to petitioner's reduced brokerage commission. As previously urged by petitioner, "By foreclosing consideration of these factors, the Commission construed Section 2(c) to erect an irrebuttable presumption that a price reduction given by the seller to the buyer at the same time as a broker accepts a smaller commission automatically *is and must be* an

'allowance in lieu of brokerage'" (Br. pp. 25-26). The Commission incorporated its ruling in the cease and desist order, which unconditionally condemned a "reduction in price" when "accompanied by a reduction in [the broker's] regular rate of commission" (J.A. 198) (See Reply Br. pp. 4-9).

Two legal developments subsequent to this Court's original consideration of the case in 1958 confirm that the Commission erroneously rejected these factors as "not applicable":

The Supreme Court's opinion in the instant case stressed the vital nature of evidence "that the buyer rendered any services to the sel . or to the [broker]" or "that anything in [the buyer's] method of dealing justified its getting a discriminatory price by means of a reduced brokerage charge." 363 U.S. 166, 173. Indeed, according to the Supreme Court, such evidence would create "quite a different case." *Ibid.*

Not only did the Supreme Court underscore the importance of such factors in determining whether Section 2(c) was violated, but the Commission itself has apparently retreated from its extreme position of total rejection applied in the case at bar. Thus, most recently in *Thomasville Chair Co.*, Dkt. 7273 (May 11, 1959), the Commission for the first time adopted the view that "all facts which would tend to rebut this inference [of an allowance in lieu of brokerage], including evidence to show that the lower prices charged certain buyers actually did not result from a passing on of a part of salesmen's commissions but was in fact due to some other cost difference, would be relevant to the point in issue and should be received"—the very considerations which the Commission deemed "not applicable" here (J.A. 204).*

[fol. 33]

In short, factors discarded by the Commission demonstrate that the lower price to Smucker was not the causal equivalent of the petitioner's commission, but was causal-

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* The Commission's about-face in *Thomasville*, however belated, is viewed by one commentator as potentially "the most constructive decision by the Commission in the history of its enforcement of Section 2(c)." Austin, *Price Discrimination and the Small Businessman*, 16 A.B.A. Antitrust Rep. 94, 105 (1960).

ly attributable to other economies and competitive considerations. And since, tested by these criteria, no allowance in lieu of brokerage was made by petitioner to the buyer, there is no proper foundation for the Commission's order to cease and desist.**

The Commission's Order Is Invalid in Any Event

Another question not reached by this Court's original opinion concerns the unduly broad scope of the Commis- [fol. 34] sion's cease and desist order even *assuming* the Commission's ruling is correct on the merits. Here again, supervening legal developments confirm the invalidity of the sweeping order entered in this case.

While deciding that Section 2(c) did apply to a seller's broker, the Supreme Court repeatedly emphasized that a price discrimination is a vital element in the application of Section 2(c), and stressed the importance of a buyer's "services" or "method of dealing" in the determination of whether an illicit allowance "in lieu of" brokerage existed. Thus, the elimination or reduction of a brokerage commission by a seller will give rise to an illegal allowance "in lieu of" brokerage in violation of Section 2(c) only if thereby a price discrimination to a favored customer is effected—provided "There is no evidence that the buyer rendered any services to the seller or to the [broker] nor that anything in its method of dealing justified its getting a discriminatory price by means of a reduced brokerage charge." 363 U.S. 166, 173, 176, 177 n. 19.

Yet, the Commission's blanket cease and desist order *

** The Court may wish to reaffirm its previous judgment of December 11, 1958, setting aside the Commission's order, or remand the proceeding to the Commission for further appropriate consideration. Cf. *A. E. Staley Mfg. Co.* v. *Federal Trade Commission*, 135 F.2d 453, 456 (7th Cir. 1943).

* The operative provisions of the order prohibit petitioner from "(1) Paying, granting or allowing, directly or indirectly, to The J. M. Smucker Company, or to any other buyer, or to anyone acting for or in behalf of or who is subject to the direct or indirect control of such buyer, any allowance or discount in lieu of brokerage, or any part or percentage thereof, by selling any

ignores these elements entirely. If any future reduction [fol. 35] in petitioner's brokerage commission by the seller were coupled with a uniform price reduction by him to *all* customers, petitioner might nonetheless be in violation of paragraph 2 of the order—a result which the Supreme Court characterized as "absurd." *Id.* at 176. Furthermore, both paragraphs of the order purport to impose liability regardless of buyer services or methods of the type which the Supreme Court specified as creating "quite a different case."

The Commission's order is also defective on a more basic ground—its sweeping ban on transactions by petitioner on behalf of *all* sellers with *all* customers even though the Commission's complaint and findings are limited to an asserted illegal payment respecting *one* seller and *one* customer in a unique situation.

Only months ago, the Supreme Court in *Communications Workers of America* v. *National Labor Relations Board*, 362 U.S. 479 (1960) (involving the National Labor Relations Act whose pertinent enforcement provisions are patterned on the Clayton Act provision governing the instant Federal Trade Commission order)* squarely ruled that a petitioner could not be indiscriminately ordered to cease and desist from violating the Labor Act as to a named employer "or any other employer," when

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food or food products to such buyer at prices reflecting a reduction from the prices at which sales of such foods are currently being effected by respondents for Canada Foods Ltd. or any other seller principal, as the case may be, where such reduction in price is accompanied by a reduction in the regular rate of commission, brokerage or other compensation currently being paid to respondents by such seller principal for brokerage services; or

"(2) In any other manner, paying, granting or allowing, directly or indirectly, to The J. M. Smucker Company, or to any other buyer, or to anyone acting for or in behalf of or who is subject to the direct or indirect control of such buyer, anything of value as a commission, brokerage or other compensation or any allowance or discount in lieu thereof upon, or in connection with, any sale of food or food products to such buyer for its own account" (J.A. 198).

* See *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U.S. 261, 268-69 (1940); *Ford Motor Co.* v. *National Labor Relations Board*, 305 U.S. 364, 373 (1939).

the petitioner was not found to have violated the Act with respect to any but the named employer and there was no "generalized scheme" of illicit activity which supported an omnibus prohibition. *Id.* at 481. According to the Court, the Labor Board had no authority to issue such an order, which the Court modified by deleting the words "or any other employer."

[fol. 36] This landmark limitation by the Supreme Court upon the universal sweep of administrative orders coincides with comparable rulings by this Court and others subsequent to this Court's original review of the instant case. Thus, in *National Labor Relations Board* v. *United Brotherhood of Carpenters*, 276 F.2d 694 (7th Cir. 1960), this Court invalidated a similar omnibus prohibition of an order barring conduct versus "any other" person beyond the one involved in the administrative complaint and record. This Court's opinion approvingly quoted this basic principle of regulatory due process:

> "We are aware of the considerations supporting a broad grant of discretion to the Board in determining the proper remedy for a violation of the Act. We consider more important, and basic to a fair administration of the Act, the hard-won principle of Anglo-American law that a judgment or order must find adequate support in the record. An order of a court or federal agency that goes beyond the record to penalize an offender as a bad actor smacks too much of attainder to be acceptable to this Court." *Id.* at 700.*

This Court's opinion recognized not only the unfathomable legal duties imposed on a respondent by such blanket prohibitions, but also the burdens cast on reviewing courts in any subsequent enforcement proceedings based on other transactions in other circumstances. *Ibid.*

Lest labor unions enjoy a preferred legal position under an analogous statutory authorization for administrative

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* See similarly, *National Labor Relations Board* v. *Brandman Iron Co.*, Pike and Fischer Ad. Law (2d series) 645 (6th Cir. 1960), where the Court of Appeals *sua sponte* modified a comparable administrative order even though it had been agreed to by the respondent.

orders to cease and desist, these recent judicial declarations appear controlling here.

The Commission's instant order enjoins petitioner in transactions on behalf of Canada Foods, Ltd. or "*any* [fol. 37] *other* seller" from making any allowances in lieu of brokerage to the J. M. Smucker Company, "or to *any other buyer*," when this case from the beginning was confined to a single alleged payment by petitioner in a sale to Smucker on behalf of Canada Foods. Hence this case does not reflect "extensive" and "substantial" misconduct*—let alone any "generalized scheme" warranting a blanket prohibition for the future.

Thus, even if the Court should permit the Commission's ruling to stand on the merits, the FTC order is invalid insofar as it purports to reach transactions by respondent without limitation on behalf of *any* seller with *any* buyer beyond the specific parties involved in this case. Nor would such a holding impair the effectiveness of the Commission's legitimate enforcement in other cases, which ordinarily concern a "generalized scheme" or an extended course of conduct, rather than the single transaction at issue here.**

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* Compare *Federal Trade Commission* v. *Mandel Bros.*, 359 U.S. 385, 393 (1959). Also, nothing in the Supreme Court's earlier decisions supports the universal sweep of the FTC's instant order, which goes far beyond any "reasonable relation to the unlawful practices found to exist"—particularly in view of the isolated nature of respondent's challenged conduct which this Court and four Supreme Court Justices deemed lawful in a close case. Compare *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419, 429 (1957); *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 473 (1952) (liability uncontested in both cases).

Indeed, the Federal Trade Commission which recently received new legislative authorization to impose heavy fines for violation of final cease and desist orders was admonished by Congress "to issue order which are as definitive as possible." S. Rep. No. 83, 86th Cong., 1st Sess. 3 (1959). And the Commission's Chairman has acknowle lged a responsibility for "ever more careful drafting of Commissi n orders" in light of these new and drastic penalties. Kintner, *The Federal Trade Commission Looks at the Canning Industry*, p. 22 (Jan. 19, 1960).

** See, e.g., the *Mandel Bros.*, *National Lead*, and *Ruberoid* cases, *supra*.

[fol. 38] CONCLUSION

For the aforementioned reasons, petitioner respectfully requests this Court summarily to set aside or modify the Commission's order, or to remand the proceeding for further appropriate action by the Commission itself.

If the Court concludes that its consideration of the above issues would be aided by further legal presentations addressed particularly to the pertinent supervening legal developments beyond the original presentations before this Court, the Court may wish to set a briefiing schedule and date for oral argument prior to adjudicating those issues left open by its original opinion and the Supreme Court's remandment.

Respectfully submitted,

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[fol. 39] CERTIFICATE OF SERVICE
(omitted in printing)

[fol. 40] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[Title omitted]

Respondent's Answer in Opposition to Petitioner's Motion to Set Aside or Modify the Commission's Order—Filed October 26, 1960

The Federal Trade Commission opposes petitioner's motion for the following reasons:

1. Petitioner is seeking to have this Court reopen and consider an issue that already has been decided adversely to petitioner by the Supreme Court, and
2. Petitioner, contrary to basic and controlling principles, has moved that this Court now consider as an issue a contention petitioner did not raise before the Federal Trade Commission at the time the case was before the Commission, and one which petitioner did not argue before this Court at the time of its consideration of the petition for review.

Proceedings and Facts Preliminary to Petitioner's Motion

For the purpose of considering petitioner's motion, we reproduce here the statement of facts appearing at the outset of the Supreme Court's decision, 363 U.S. 166, 167-168:

[fol. 41] [Petitioner] is a broker or sales representative for a number of principals who sell food products. One of the principals is Canada Foods Ltd., a processor of apple concentrate and other products. [Petitioner] agreed to act for the Canada Foods for a 5% commission. Other brokers working for the same principal were promised a 4% commission. [Petitioner's] commission was higher because it stocked merchandise in advance of sales. Canada

Foods established a price for its 1954 pack of apple concentrate at $1.30 per gallon in 50-gallon drums and authorized its brokers to negotiate sales at that price.

The J. M. Smucker Co., a buyer, negotiated with another broker, Phipps, also working for Canada Foods, for apple concentrate. Smucker wanted a lower price than $1.30 but Canada Foods would not agree. Smucker finally offered $1.25 for a 500-gallon purchase. That was turned down by Canada Foods, acting through Phipps. Canada Foods took the position that the only way the price could be lowered would be through reduction in brokerage. About the same time [petitioner] was negotiating with Smucker. Canada Foods told [petitioner] what it had told Phipps, that the price to the buyer could be reduced only if the brokerage were cut; and it added that it would make the sale at $1.25—the buyer's bid—if [petitioner] would agree to reduce its brokerage from 5% to 3%. [Petitioner] agreed and the sale was consummated at that price and for that brokerage. The reduced price of $1.25 was thereafter granted Smucker on subsequent sales. But on sales to all other customers, whether through [petitioner] or other brokers, the price continued to be $1.30 and in each instance [petitioner] received the full 5% commission. Only on sales through [petitioner] to Smucker were the selling price and the brokerage reduced.

The Commission held, after issuance of complaint and appropriate administrative procedure, that Broch had violated Section 2(c) of the amended Clayton Act, which in part makes it unlawful for "any person" to make an allowance in lieu of "brokerage" to the "other party to such transaction," and the Commission thereupon issued its order to cease and desist.

Upon review, this Court held that a seller's broker is not covered by Section 2(c). This Court also held that, while the seller was able to reduce its price because of Broch's agreement to reduce its brokerage, Broch could [fol. 42] not be said to have paid anything to the buyer.

The decision concluded, "For the foregoing reasons, the order of the Federal Trade Commission entered December 10, 1957 is set aside. Order Set Aside."

The Supreme Court, on June 6, 1960, held that a seller's broker is covered by the provisions of Section 2(c) and that Broch had violated that section. The Court reversed this Court's judgment and remanded the cause to this Court for proceedings in conformity with the Supreme Court's opinion.

Thereafter, Broch petitioned the Supreme Court for rehearing, which petition was denied on October 10, 1960.

Petitioner now moves this Court to set aside or modify the Federal Trade Commission's order to cease and desist and advances two contentions in support of its motion. As nearly as we can tell from petitioner's motion, these contentions are:

1. "• • • The price reduction to the buyer was accounted for by legitimate competitive and economic considerations other than [petitioner's] reduced rate of commission, and hence was not an allowance 'in lieu of' brokerage within the contemplation of Section 2(c)." (Motion, p. 2.)

2. The order is unduly broad.

The propriety of making these contentions at this time is discussed seriatim under headings numbered I and II.

[fol. 43] I. *The Supreme Court already has determined that Broch made an allowance in lieu of brokerage to the buyer in violation of Section 2(c) of the amended Clayton Act and petitioner cannot now be heard to contend that the facts established a price discrimination granted because of competitive and economic considerations rather than the payment of an allowance in lieu of brokerage.*

From a reading of petitioner's motion one might gain the impression that the Supreme Court in this matter held only, and this by a 5-4 margin, that a seller's broker is covered by Section 2(c) of the amended Clayton Act, so that all other issues involved in the case were left unresolved. Nothing could be further from the truth.

All nine Justices of the Supreme Court held that Section 2(c) of the amended Clayton Act applies to a seller's broker (Majority opinion, 363 U.S. at pp. 170, 175: minority opinion, 363 U.S. at p. 179). The members of the Supreme Court differed on the question of whether the seller's broker, under the facts of this case, had made an allowance in lieu of brokerage to the "other party to such transaction," the buyer, one of the acts prohibited by Section 2(c). The majority of the Court, after presentation by petitioner of substantially the same argument it now wants this Court to consider,[1] held that Sec- [fol. 44] tion 2(c) applied to the factual situation under review.[2] Four of the Justices were of the opinion that it did not.

This construction of the Court's opinion is obvious from a reading thereof[3] and is the construction placed upon the opinion by petitioner when it petitioned the Supreme Court for a rehearing on August 15, 1960, and stated (at p. 2), "*In concluding that the case at bar disclosed a violation of Section 2(c),* the majority opinion expressly reserved a decision of the facts which it erroneously assumed to be absent here." (Emphasis supplied.)

Further, petitioner (Motion, p. 4) now grounds its contention upon certain quotations from the Supreme Court's opinion, but neglects to include in the quotations those portions whereby the Supreme Court has made it clear that those quoted portions do not apply to the present case. The complete paragraph from which petitioner picked particular parts reads as follows:

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[1] Various portions of petitioner's brief to the Supreme Court illustrative of the fact that petitioner presented its "competitive and economic considerations" argument to that Court are reproduced in the appendix hereto. (App. 1a-2a.)

[2] And all of the facts of this case certified for consideration by this Court of Appeals were before the Supreme Court.

[3] We do not wish to belabor this obvious fact in this narrative of our opposition. Therefore, for the Court's convenience, we have reprinted in an appendix hereto some of the portions of the Supreme Court's opinion that demonstrate that the Court decided that the broker in this case, upon the facts of this case, violated Section 2(c). (App. 3a-4a.)

> We are asked to distinguish these precedents on the ground that there is no claim by the present buyer that the price reduction, concededly based in part on a saving to the seller of part of his regular brokerage cost on the particular sale, was justified by the elimination of services normally performed by the seller or his broker. *There is no evidence that the buyer rendered any services to the seller or to*
> [fol. 45] *the respondent nor that anything in its method of dealing justified its getting a discriminatory price by means of a reduced brokerage charge.* We would have quite a different case *if there were such evidence and we need not explore the applicability of § 2(c) to such circumstances. One thing is clear—the absence of such evidence and the absence of a claim that the rendition of services or savings in distribution costs justified the allowance does not support the view that § 2(c) has not been violated.* (363 U.S., at pp. 173-174.) (Emphasis supplied.)

And on the last page of its opinion (363 U.S. n. 19, p. 177) the Court stated:

> • • • as we have emphasized, the "savings" in brokerage was passed on to a single buyer who was not shown in any way to have deserved favored treatment.

Petitioner, in its August 15, 1960, petition to the Supreme Court for rehearing, attempted to get that Court to reconsider its conclusion that the considerations noted in the paragraph quoted above had no application to the present case.[4] That petition was denied. The Supreme Court having refused to change its decision, petitioner is now in the position of asking this Court to change the decision of the Supreme Court.

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[4] The pertinent portion of petitioner's petition to the Supreme Court for rehearing is reproduced in the appendix at the end of this answer. (App. 5a.)

II. *The scope of the Commission's order is not properly a matter for this Court's consideration at this time.*

That portion of petitioner's motion which is directed to the scope of the Commission's order to cease and desist (Motion, pp. 5-9) should be denied on the basis of two basic and controlling principles: (1) issues not raised before an administrative agency may not be raised at the time of court review of the administrative decision; and (2) contentions not argued before the Court are waived.

[fol. 46] 1. Petitioner did not challenge the scope of the order in its appeal to the Commission from the initial decision of the hearing examiner and, therefore, should not be heard to raise an issue as to the scope of the order before this Court.

The Commission's rules of practice provide that an appeal from an initial decision to the Commission shall be in the form of a brief and shall contain among other things a list of the questions involved and to be argued and an argument presenting clearly the points of fact and law relied upon in support of the position taken on each question. 16 CFR 3.22(b). Pertinent portions of the rule are reproduced in the appendix hereto. (App. 6a.)

The order to cease and desist was issued by the hearing examiner as a part of his initial decision (J.A. 194-195) and was adopted by the Commission as its own (J.A. 197-205) after submission of briefs and oral arguments by both sides, in the course of which petitioner raised no issue as to the scope of the order.[5]

The controlling rule has been clearly stated by the Supreme Court in *Moog Industries, Inc.* v. *Federal Trade Commission*, 355 U.S. 411, 414 (1958) as follows:

> If the question has not been raised before the Commission, • • • a reviewing court should not in any event entertain it.

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[5] Petitioner's appeal brief to the Commission appears at pages 156 through 187 of the transcript of record certified to this Court.

The reasons underlying the rule were explained by the Supreme Court in the earlier case of *United States* v. *L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 36-37 (1952) as follows:

> [fol. 47] We have recognized in more than a few decisions, and Congress has recognized in more than a few statutes, that orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts. * * * Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice.[6]

2. Petitioner made no argument to this Court, at the time of consideration of the petition for review, on the question of the scope of the order and, therefore, its contentions on this score were waived.

Petitioner, in the footnote on page 1 of its Motion, states, "These issues are comprehended within the original petition for review (J.A. 206)." Petitioner, however, did not go on to indicate where in its argument to this Court during the course of this Court's consideration of its petition for review it pursued this contention. It did not because it could not.

In *Taylor* v. *Fee*, 233 F.2d 251, 259 (7th Cir. 1956), *aff'd*, 353 U.S. 553 (1957) this Court stated:

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[6] This Court has ruled to the same effect in *United States ex rel. Beck* v. *Neelly*, 202 F.2d 221, 224 (7th Cir. 1953), *cert. denied*, 345 U.S. 997 (1953). For examples of other cases to the same effect, see *Unemployment Compensation Commission of Alaska* v. *Aragon*, 329 U.S. 143, 155 (1946); *Barclay Home Products Inc.* v. *Federal Trade Commission*, 241 F.2d 451, 452 (D.C. Cir. 1957), *cert. denied*, 354 U.S. 942 (1957); *Democrat Printing Co.* v. *Federal Communications Commission*, 202 F.2d 298, 303-304 (D.C. Cir. 1952); *DeGorter* v. *Federal Trade Commission*, 244 F.2d 270, 272 (9th Cir. 1957).

In its brief herein the state makes no further reference to this contention ignoring it in its "summary of argument," "propositions of law relied upon and [fol. 48] citation of authorities" and in the body of its argument (See rule 16 of this court referring to the contents of briefs). No reference thereto was made in oral argument before this court. Under these circstances we treat this contention as waived.[7]

On review, the Supreme Court, *sub nom. California* v. *Taylor*, 353 U.S. 553, 556 n. 2 (1957), refused to recognize the contention involved by reason of this Court having considered the contention as waived.

Conclusion

Respondent believes that it is so clear that petitioner's contentions should not be considered by this Court that it has not included in its answer any discussion of the merits of those contentions. It is respectfully submitted that there are no further issues properly before this Court and that this Court should enter its decree affirming the Commission's order to cease and desist.

[fol. 49] If, however, this Court should decide to consider the merits of petitioner's contentions, it is respectfully requested that respondent be given an opportunity

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[7] To the same effect, see *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U.S. 359, 369 (1927); *Donnalley* v. *United States*, 276 U.S. 505, 511 (1923); *Mid-Southern Foundation* v. *Commission of Internal Revenue*, 262 F.2d 134, 139 (6th Cir. 1958), *cert. denied*, 359 U.S. 991 (1959); *Roberts* v. *Sawyer*, 252 F.2d 286, 287 (10th Cir. 1958); *Rystad* v. *Boyd*, 246 F.2d 246, 248 (9th Cir. 1957), *cert. denied*, 355 U.S. 912 (1958); *Chain Institute, Inc.* v. *Federal Trade Commission*, 246 F.2d 231, 235 (8th Cir. 1957), *cert. denied*, 355 U.S. 895 (1957); *Sunbeam Corporation* v. *Masters of Miami*, 225 F.2d 191, 192-193 (5th Cir. 1955); *Mahanor* v. *United States*, 192 F.2d 873, 877 (1st Cir. 1951); *Hubsiaman* v. *Louis Keer Shoe Co.*, 129 F.2d 137, 142 (7th Cir. 1942); *Cooper* v. *O'Connor*, 107 F.2d 207, 209 (D.C. Cir. 1939), *cert. denied*, 308 U.S. 617 (1939).

to demonstrate its reasons for believing that said contentions are without merit.

Respectfully submitted,

/s/ P. B. Morehouse
Acting General Counsel,
Federal Trade Commission.

/s/ Alan B. Hobbes
Assistant General Counsel,
Federal Trade Commission.

/s/ Alvin L. Berman
Attorney,
Federal Trade Commission.
Attorneys for Respondents

Dated: October 25, 1960.

[fol. 50] CERTIFICATE OF SERVICE
(omitted in printing)

[fol. 51] APPENDIX TO RESPONDENT'S ANSWER

EXCERPTS FROM PETITIONER'S BRIEF TO THE SUPREME COURT TO ILLUSTRATE THAT PETITIONER PRESENTED ITS "COMPETITIVE AND ECONOMIC CONSIDERATIONS" ARGUMENT TO THAT COURT *

[2]

* * * *

QUESTIONS PRESENTED

* * * *

[3]

* * * *

The focal question before this Court is whether a broker taking a smaller rate of commission when the seller principal openly reduces his price is guilty of granting to the buyer an allowance "in lieu" of an illicit brokerage payment in violation of Section 2(c)—*irrespective of the cost or competitive considerations which would make the seller's price lawful* under the provision governing variations in price. (Emphasis supplied.)

[15]

* * * *

SUMMARY OF ARGUMENT

I. Section 2(c), the so-called Brokerage Clause of the Robinson-Patman Act, does not prohibit an independent broker representing the seller from accepting a lower commission rate on a particular sale *where the seller at the same time openly reduces his price to the buyer for a large lot in a competitive situation.* (Emphasis supplied.)

* * * *

[16]

* * * *

The Commission's novel theory of condemning as illegal

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* The illustrations are reproduced as examples and are not intended to be exhaustive.

per se an open price reduction unrelated to an illicit Brokerage payment not only contravenes the text, history, and judicial application of Section 2(c), but does not even square with the Commission's previous position before this Court in the *Simplicity* case and the views of its own authorities which confirm that the Brokerage Clause is not a proper vehicle for outlawing those *open price reductions which Congress wished to preserve under the pricing provisions of the Act.* (Emphasis supplied.)

[fol. 52]

• • • •

[19]

• • • •

ARGUMENT

• • • •

[20]

• • • •

As detailed below, *the FTC's novel theory perverts the statutory plan by treating a competitive open price transaction as a per se illegal allowance "in lieu" of brokerage,* departs from every judicial ruling in point, and contradicts the Congressional understanding and the Commission's representations in the *Simplicity* case. (Emphasis supplied.)

• • • •

[29]

• • • •

Moreover, such illegality would attach irrespective of any competitive effects; regardless of the seller's necessities of reducing his price in good faith to meet a competitor's equally low price as permitted by Section 2(b); notwithstanding the seller's savings in an economical transaction which can "cost-justify" a lower price under Section 2(a); and despite the understanding of the transaction by all parties in terms of price rather than brokerage (see pp. 9-10, supra). (Emphasis supplied.)

• • • •

[32]

• • • •

By now asserting that brokerage fees *must not* be reduced regardless of *the seller's competitive price variation*, the Commission not only defeats the Congressional guarantees, but adopts the very excrescences of the Brokerage Clause which were decried by Senator Logan two decades ago as among the "rather fantastic ideas advanced" to discredit the legislation. (Emphasis supplied.)

• • • •

[34]

• • • •

Apart from the fact that *a seller's open competitive price reduction coupled with a smaller broker's fee is not an allowance "in lieu" of illicit brokerage*, which [35] alone requires affirmance of the judgment below, the Commission's theories *vis a vis* the independent seller's broker participating in such a transaction are *a fortiorari* invalid on additional grounds. (Emphasis supplied.)

[fol. 53]

SOME OF THE PORTIONS OF THE SUPREME COURT'S OPINION, 363 U.S. 166, THAT DEMONSTRATE THAT THE COURT DECIDED, UPON THE FACTS OF THE CASE, THAT BROCH MADE AN ALLOWANCE IN LIEU OF BROKERAGE IN VIOLATION OF SECTION 2(c) OF THE AMENDED CLAYTON ACT[9]

Section 2(c) of the Robinson-Patman Act makes it unlawful for "any person" to make an allowance in lieu of "brokerage" to the "other party to such transaction." *The question is whether that prohibition is applicable to the following transactions by respondent.* (at p. 167)

[This is followed by a detailed recitation of the facts deemed pertinent by the Supreme Court.] (at pp. 167-168)

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[9] These are examples only. The entire opinion follows a detailed recitation of the facts and clearly constitutes a decision that Broch violated Section 2(c).

The particular evil at which § 2(c) is aimed can be as easily perpetrated by a seller's broker as by the seller himself. The seller and his broker can of course agree on any brokerage fee that they wish. Yet when they agree upon one, only to reduce it when necessary to meet the demands of a favored buyer, they use the reduction in brokerage to undermine the policy of § 2(c). The seller's broker is clearly "any person" as the words are used in § 2(c)—as clearly such as a buyer's broker. (at p. 170)

We are asked to distinguish these precedents on the ground that there is no claim by the present buyer that the price reduction, concededly based in part on a saving to the seller of part of his regular brokerage cost on the particular sale, was justified by the elimination of services normally performed by the seller or his broker. *There is no evidence that the buyer rendered any services to the seller or to the respondent nor that anything in its method of dealing justified its getting a discriminatory price by means of a reduced brokerage charge. We would have quite a different case if there were such evidence* and we need not explore the applicability of § 2(c) to such circumstances. One thing is clear—*the absence of such evidence* and the absence of a claim that the rendition of services or savings in distribution costs justified the allowance does not support the view that § 2(c) has not been violated.

• • • •

• • • *If respondent merely paid over part of his commission to the buyer, he clearly would have violated the* [fol. 54] *Act. We see no distinction of substance between the two transactions.* In each case the seller and his broker make a concession to the buyer as a consequence of his economic power. In both cases the result is that the buyer has received a discriminatory price. In both cases the seller's broker reduces his usual brokerage fee to get a particular contract. There is no difference in economic effect between the seller's broker splitting his brokerage commission with the buyer and in his yielding part of the brokerage to the seller to be passed on to the buyer in the form of a lower price.

• • • •

• • • *The respondent was a necessary party to the price reduction granted the buyer. His yielding of part of his brokerage to be passed on to the buyer was a sine qua non of the price reduction.*

• • • •

• • • A price reduction based upon alleged savings in brokerage expenses is an "allowance in lieu of brokerage" when given only to favored customers. *Had respondent, for example, agreed to accept a 3% commission on all sales to all buyers there plainly would be no room for finding that the price reductions were violations of § 2(c).* Neither the legislative history nor the purposes of the Act would require such an absurd result, and neither the Commission nor the courts have ever suggested it. *Here, however, the reduction in brokerage was made to obtain this particular order and this order only and therefore was clearly discriminatory.*

The applicability of § 2(c) to seller's brokers *under circumstances not distinguishable in principle from the present case* is supported by a 20-year-old administrative interpretation. • • •

If we held that § 2(c) is not applicable here, we would disregard the history which we have delineated, overturn a settled administrative practice, and approve a construction that is hostile to the statutory scheme—one that would leave a large loophole in the Act. • • •

(at pp. 173-177)

We need not view this administrative practice as laying down an absolute rule that § 2(c) is violated by the passing on of savings in broker's commissions to direct buyers *for here, as we have emphasized, the "savings" in brokerage was passed on to a single buyer who was not shown in any way to have deserved favored treatment.* (note 19, p. 177)

—(Emphasis supplied throughout.)

[fol. 55]

EXCERPT FROM PETITIONER'S PETITION TO THE SUPREME COURT FOR REHEARING [10]

1. The Majority Opinion Contains a Key Misconception of Fact

In concluding that the case at bar disclosed a violation of Section 2(c), the majority opinion expressly reserved a decision under facts which it erroneously assumed to be absent here.

Thus, the opinion declared that "There is no evidence that the buyer rendered any services to the seller or to the [broker] nor that anything in its method of dealing justified its getting a discriminatory price by means of a reduced brokerage charge." 363 U.S. at 173, 177, n. 19. Indeed, the opinion stressed that "We would have quite a different case if there were such evidence and we need not explore the applicability of § 2(c) to such circumstances." *Id.* at 173.

Yet precisely such evidence is revealed in the record and proposed findings, but was treated by the Commission as legally immaterial in a Brokerage Clause proceeding. (R. 8, 81, 131-134, 170, 172, 210)

From the outset of this case, the respondent maintained that the transaction reflecting the seller's lower price and the broker's reduced commission entailed "savings to the seller principal in the cost of handling and delivery of the goods sold," and required less sales effort and selling expense for the respondent broker. (R. 8, 131-134, 170, 172) The record contains specific evidence of the seller's savings in freight, customs and processing of the product in question. (R. 133) For the broker, the record shows that this transaction concerned "a very large order, and it is much cheaper in our office because, in order to obtain smaller customers for the same sized order, we might have to make thirty or forty or fifty or sixty long distance calls which are very costly in time

[10] This demonstrates that the petition for rehearing, which was denied, was based upon the same grounds that petitioner now presents to this Court.

and expense, actual cash expense, and on this three per cent, we would make more." (R. 81)

In short, the very "circumstances" which the majority opinion reserved as presenting "quite a different case" are actually disclosed by the instant record and were overlooked by an opinion preoccupied with novel legal issues. (pp. 2-3.)

[fol. 56]

PERTINENT PORTIONS OF FEDERAL TRADE COMMISSION RULES COVERING APPEALS TO THE COMMISSION AND THE MANNER OF PRESENTING QUESTIONS ON APPEAL (RULES OF PRACTICE FOR ADJUDICATIVE PROCEEDINGS 16 CFR 3.22

§ 3.22 *Appeal from initial decision*—

(a) *Who may appeal: notice of intention.* Any party to a proceeding may appeal an initial decision to the Commission. • • •

(b) *Content of appeal brief.* (1) The appeal shall be in the form of a brief and shall contain, in the order indicated below, the following:

• • • •

(iii) A list of the questions involved and to be argued; and

(iv) An argument presenting clearly the points of fact and law relied upon in support of the position taken on each question, with specific page references to the trans ript and upon the legal or other material relied upon.

(2) Material not included in the appeal may not be presented to the Commission in oral argument or otherwise.

[fol. 57] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[Title omitted]

MOTION FOR LEAVE TO FILE ATTACHED REPLY TO RESPONDENT'S ANSWER IN OPPOSITION TO PETITIONER'S MOTION TO SET ASIDE OR MODIFY THE COMMISSION'S ORDER—Filed October 28, 1960

Petitioner respectfully requests leave of Court to file the attached reply to the answer filed by the Federal Trade Commission opposing petitioner's motion requesting the Court to set aside or modify the Commission's cease and desist order for reasons not considered in the original opinion in this case. 261 F.2d 725.

As demonstrated in the attached reply of petitioner, the Commission has significantly failed to address itself to the merits, and instead has obscured both the record and the pertinent legal considerations that govern this case. Since the Commission's contentions confuse rather than meet the points presented by petitioner's motion, petitioner respectfully submits that sound judicial administration, as well as basic fairness to petitioner, warrant the Court's consideration of the attached reply.

Respectfully submitted,

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[fol. 59]

• • • •

REPLY TO RESPONDENT'S ANSWER IN OPPOSITION TO PETITIONER'S MOTION TO SET ASIDE OR MODIFY THE COMMISSION'S ORDER—Filed October 28, 1960

Not only is the Commission's attempt to duck consideration of the issues remaining in this case belied by the Supreme Court's express remand for "further proceedings," but equally important, the Commission's characterization of those issues cannot be squared with the record.

"When [the Supreme Court] determines that a Court of Appeals has applied an incorrect principle of law, wise judicial administration normally counsels remand of the cause to the Court of Appeals with instructions to reconsider the record." *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 508 (1951). This is precisely what the Supreme Court has done here. Cf. *Federal Trade Commission* v. *Anheuser-Busch, Inc.*, 363 U.S. 536 (1960). The Supreme Court did not, as the Commission in effect urges, reinstate the Commission decision so as to preclude this Court's right to consider petitioner's contentions on their merits.

Unless the Supreme Court's remand for "further proceedings" in conformity with its opinion is an empty formality devoid of legal significance, the express terms of the remand alone must foreclose the Commission's effort to block consideration at this time of the issues not reached by this Court's original decision in December 11, 1958.

[fol. 60]

Economic And Competitive Considerations Improperly Rejected By The Commission

From the outset of this case, as the Commission recognizes (Answer pp. 4-6), petitioner contended that even if Section 2(c) applied to him in the first place, the seller's price reduction to Smucker was accounted for by legitimate economic and competitive considerations which demonstrated that it was not an illegal allowance "in lieu of" brokerage. These considerations, however, the Com-

mission ruled "not applicable" to a Section 2(c) proceeding (Motion pp. 4-5).

In view of the Commission's rejection of these considerations as "not applicable" to a Brokerage Clause proceeding, the Supreme Court understandably assumed that

> "There is no evidence that the buyer rendered any services to the seller or to the [petitioner] nor that anything in its method of dealing justified its getting a discriminatory price by means of a reduced brokerage charge. We would have quite a different case if there were such evidence and we need not explore the applicability of § 2(c) to such circumstances." 363 U.S. 166, 173.

It would be a strange doctrine indeed if the Commission were allowed first to foreclose an evidentiary showing on the ground that it was "not applicable," and then to profit later from a claim that petitioner has not made the requisite evidentiary showing. Only recently, the Supreme Court scored a Commission effort to invoke this very bootstrap doctrine so that it might capitalize on the absence of proof which it had previously rejected in a Robinson-Patman proceeding. Cf. *Federal Trade Commission* v. *Standard Oil Co.*, 355 U.S. 396, 402 (1958).

Particularly in view of the Commission's subsequent retreat in the *Thomasville* case in May 1959 from its rejection of such considerations here in December 1958 (Motion p. 5), the Commission can hardly now urge that this Court has no right to consider petitioner's contentions in the face of the Supreme Court's remandment. Indeed, the Commission's reluctance to address itself to the merits corroborates the force of petitioner's position.

[fol. 61]

Invalidity Of Commission Order To Cease And Desist

The Commission's failure to defend its order on the merits is equally telling in light of petitioner's previous challenges to the order's validity, which are confirmed by judicial developments subsequent to the original briefing of this case in 1958.

Petitioner challenged the Commission's order in his petition for review (J.A. 209), and specifically argued in his original briefs that "either the Commission order or Commission counsel's appellate theory must be invalid" (Reply Br. p. 7). At all times, petitioner contested the legal theory codified in the Commission's order which *automatically* declares a price reduction coupled with a lower broker's commission to be an illegal brokerage allowance—*wholly irrespective* of the cost and competitive considerations which the Supreme Court's opinion stressed as crucial to the determination of a Brokerage Clause violation (Br. pp. 20-23; Reply Br. pp. 6-8).

Surely petitioner in its briefs before the Commission and this Court in 1958 could not have been expected to discuss the Supreme Court and appellate court decisions *decided in 1960* (Motion pp. 7-8) which highlight the invalidity of the Commission's sweeping order.*

The most elementary considerations of fairness dictate that the Commission must not handicap a small food broker forever with an unduly restrictive injunction, which is based on a single business transaction considered entirely lawful by this Court and four Justices of the Supreme Court. Failing to meet the merits of petitioner's motion, the Commission would preclude this Court's review by resort to groundless technicalities.

[fol. 62] CONCLUSION

If the Court should conclude that the issues tendered by petitioner were not sufficiently explored by the Commission at the administrative level, the proper course would be to remand to the Commission for further ap-

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* Equity and precedent alike hold that *supervening* legal developments are *always* open for consideration in the course of a pending judicial review. E.g., *American Chain & Cable Co.* v. *Federal Trade Commission*, 142 F.2d 909 (4th Cir. 1944); *American Drug Co.* v. *Federal Trade Commission*, 149 F.2d 608 (8th Cir. 1945); cf. *Ford Motor Co.* v. *National Labor Relations Board*, 305 U.S. 364 (1939); *National Labor Relations Board* v. *Service Trade Chauffeurs Local*, 191 F.2d 65 (2d Cir. 1951).

propriate consideration, rather than to foreclose all opportunity for a ruling on the merits.

Respectfully submitted,

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Attorneys for Petitioners

[fol. 63] CERTIFICATE OF SERVICE
(omitted in printing)

[fol. 64] IN
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Before

Hon. John S. Hastings, Chief Judge
Hon. F. Ryan Duffy, Circuit Judge
Hon. Elmer J. Schnackenberg, Circuit Judge

No. 12305

HENRY BROCH AND COMPANY, a co-partnership consisting of Henry Broch and Oscar Adler, PETITIONERS

vs.

FEDERAL TRADE COMMISSION, RESPONDENT

ORDER GRANTING LEAVE TO FILE A REPLY TO RESPONDENT'S ANSWER, ETC.—
November 3, 1960

The Court having considered the motion of Henry Broch and Company, petitioners, for leave to file a reply to respondent's answer, IT IS HEREBY ORDERED that said leave is hereby granted.

And the court having considered the motion of said petitioner to set aside or modify Commission order for reasons not considered in original opinion, respondent's answer thereto, and petitioners' reply to said answer, IT IS HEBERY ORDERED that petitioners' said motion be and the same is hereby denied.

On the court's own motion IT IS HEREBY ORDERED that the order of the Commission is hereby amended and modified in the following respects:

Strike from the order of the hearing examiner, appearing on pages 194 and 195 of the joint appendix herein, which was adopted as the decision of the Commission, in its final order shown on page 197 of said joint appendix, the following language:

"or any other seller principal,"
"or to any other buyer,"
"or any other seller principal,"
"or to any other buyer,"

IT IS FURTHER ORDERED that the order of the Commission, as so amended and modified, be affirmed.

[fol. 65] Clerk's Certificate to foregoing transcript omitted in printing

[fol. 66] SUPREME COURT OF THE UNITED STATES

No. ....., October Term, 1960

FEDERAL TRADE COMMISSION, PETITIONER

v.

HENRY BROCH AND COMPANY

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—January 31, 1961

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 1st, 1961.

/s/ Tom C. Clark
Associate Justice of the Supreme Court of the United States

Dated this 31 day of January, 1961.

[fol. 67] SUPREME COURT OF THE UNITED STATES

No. 864, October Term, 1960

FEDERAL TRADE COMMISSION, PETITIONER

vs.

HENRY BROCH AND COMPANY

ORDER ALLOWING CERTIORARI—May 15, 1961

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted, and the case is transferred to the summary calendar and set for argument immediately following No. 654.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 68] SUPREME COURT OF THE UNITED STATES

No. 864, October Term, 1960

FEDERAL TRADE COMMISSION, PETITIONER

vs.

HENRY BROCH AND COMPANY

ORDER GRANTING JOINT MOTION TO USE THE RECORD IN No. 61, OCTOBER TERM, 1959—June 19, 1961

ON CONSIDERATION of the joint motion for leave to use the record in No. 61, October Term, 1959,

IT IS ORDERED by this Court that the said motion be, and the same is hereby, granted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1961 000000 8